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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
International Settlement Rates	)	IB Docket No. 96-261
	)	

COMMENTS OF SPRINT

Sprint Communications Company, L.P. ("Sprint") respectfully submits its comments in response to the Commission's December 19, 1996 *Notice of Proposed Rulemaking*, FCC 96-484 ("*NPRM*") in the above-captioned proceeding.

SUMMARY

Sprint believes that the Commission has jurisdiction over settlement rates that permits it to prescribe the use of a particular settlement rate or rates by U.S. carriers. The Commission's jurisdiction permits it to abrogate existing contracts between U.S. carriers and their foreign correspondents if it is in the public interest to do so. Sprint also believes that the Commission should, prior to adopting its benchmarks, discuss further the basis for its jurisdiction over international accounting and settlement rates.

The Commission's Tariffed Component Pricing scheme to establish the upper end of its benchmark ranges is reasonable. However, before taking actions to enforce the use of a particular settlement rate by a U.S. carrier, the public, including any foreign carriers who would be affected by such a prescription, should be given the opportunity to comment on the Commission's proposed actions.

The Commission should utilize both country-specific benchmarks, which would apply where reliable information permits the use of such benchmarks, and averaged benchmarks tied to a specific country's stage of economic development where such country specific information is lacking.

The Commission's proposal to allow U.S. carriers up to four or five years to negotiate settlements that comply with any benchmarks the Commission establishes is a reasonable. Moreover, the Commission should employ a "glidepath" requiring a certain amount of annual progress towards lowered settlement rates.

Finally, the Commission should proceed carefully in defining and responding to competitive distortion. It should not expect to be able to define *a priori* just what actions will constitute competitive distortion.

INTRODUCTION

In the long run, greater competition in the provision of telecommunications both in U.S. and foreign markets is the best guarantor of cost-based accounting rates. However, this approach is not useful in the broadest sense until workable competition exists in both the U.S. and foreign markets. Such competition is in its infancy, or has yet to begin in most foreign nations.

Pending the arrival of genuine international competition, it is extremely important that the Commission take concrete steps to lower international accounting and settlement rates. As the *NPRM* points out, settlement rates (and the amount varies, of course, from country to country) are widely understood to be substantially above any reasonable measure of the applicable costs. Because there is on a worldwide basis a substantial imbalance of traffic between the U.S. and foreign countries, above-cost settlement rates contribute to an increasing balance of payments deficit for the U.S. *vis-à-vis* foreign countries as a whole.

The substantial harm that this imbalance causes to the U.S. economy and to the public interest is palpable, and the Commission must now undertake to do what it can, consistent with the Act, to remedy this situation. Sprint supports the Commission's proposal to establish "benchmark rates" that would place some modest upper limits on the amount by which U.S. ratepayers must continue to subsidize the rest of the world.

I. *Jurisdictional Issues*

The Commission did not devote much discussion to its jurisdiction over settlement rates of U.S. carriers in either the *NPRM* or in its *Second Report and Order* in CC Docket No. 90-337,[1] where it originally established accounting rate benchmarks. In the latter docket, it characterized its benchmark range as a helpful target to be used in the negotiation process, and not as a prescription.[2]

In the instant *NPRM*, the new benchmarks, if adopted, would be more than just a negotiating target. At least one of the enforcement mechanisms the Commission proposes in para. 89 of the *NPRM* -- that of directing U.S. carriers to pay a settlement rate no higher than the benchmark rate -- would appear to be a prescription under Section 205 of the Communications Act.

There may well be legal challenges to the Commission's jurisdiction over U.S. carrier's settlement rates. Accordingly, Sprint believes that if the Commission decides to adopt its benchmarks to impose an interim settlement arrangement or to prescribe an actual settlement rate, it

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[1] Regulation of International Accounting Rates, 7 FCC Rcd 8040 (1992) (subsequent history omitted).

[2] *Id.* at paras. 8, 18. In para. 20 of its Notice of Proposed Rulemaking in CC Docket No. 90-337, 5 FCC Rcd 4948 (1990), the Commission asserted its authority to prescribe accounting rates and asked for comment on this subject, but never affirmed this authority.

would be important for the Commission to discuss more fully its jurisdiction to accomplish this.

The basis for the Commission's jurisdiction over international communications derives from Section 2(a) of the Communications Act, which gives the Commission jurisdiction over all interstate and foreign communication. Section 3(17) of the Act defines "foreign communication" as, *inter alia*, "communication to or from any place in the United States to or from a foreign country."

A settlement rate is a mutually upon agreed rate that a U.S. carrier charges a foreign carrier to terminate traffic from the theoretical midpoint of an international communication. It is also the rate that the foreign carrier charges the U.S. carrier to terminate U.S. originated traffic. Inasmuch as traffic settled under accounting rates either originates or terminates in the U.S., it falls squarely within the Act's definition of a "foreign communication" in Section 3(17).

Agreements establishing such intercarrier rates are fully subject to the Commission's jurisdiction even when one of the carrier parties to the agreement (*e.g.* a foreign carrier) is not subject to the Commission's jurisdiction. The Act clearly contemplates just this situation. The second proviso in Section 201(b) states:

> ...nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to

> this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, *if the Commission is of the opinion that such contract is not contrary to the public interest*... (emphasis supplied)

There would be no reason to make such contracts subject to the public interest test if the Commission had no authority over them. The Commission therefore has jurisdiction over the contracts between a U.S. carrier and a foreign carrier, including the rates established under those contracts.

The courts have long ago affirmed this power. *See R.C.A. Communications* v. *United States*, 43 F.Supp. 851 (S.D.N.Y. 1942). The *RCA* court's ruling means that the Commission has plenary authority over U.S. carriers' practices *vis-à-vis* their foreign correspondents and that the Commission may exercise this authority over U.S. carriers even though it may interfere with agreements between those two carriers. It is not necessary that the Commission have jurisdiction over a foreign carrier itself in order to have jurisdiction over settlement rates. All that is necessary is that the Commission, in dealing with settlements, limit the exercise of its authority to U.S. carriers.

By exercising jurisdiction solely over U.S. carriers, the Commission can, for example, order U.S. carriers to pay foreign carriers at no more than a just and reasonable settlement rate which the Commission can prescribe under Section 205 of the Communications Act. It may do so even though that rate may be inconsistent with a preexisting agreement between the carriers. *See RCA*. It may order a U.S. carrier to pay for termination of its traffic at an interim rate without engaging in a Section 205 prescription.[3] It may require U.S. carriers to withhold settlement payments from a foreign carrier.[4] While it cannot require the foreign carrier to pay a particular settlement rate, it can find that the foreign carrier's refusal to exchange traffic at that rate renders the service provided by the U.S. carrier contrary to the public interest; and it can thus refuse to grant or can revoke the U.S. carrier's authority to exchange traffic with the foreign carrier for that reason.[5] The Commission does not need jurisdiction over a foreign carrier to take these steps.

There are strong policy reasons supporting Commission jurisdiction over international settlement rates. As the *RCA* court found, 43 F. Supp. at 855, it would be an improbable reading of the Act to conclude that a U.S. carrier and a foreign carrier could insulate unreasonable practices from

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[3] Lincoln Telephone and Telegraph Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981). There, the court found that the Commission had the power to make such an interim payment arrangement pursuant to Section 4(i) of the Communications Act.

[4] AT&T Corp., DA 96-378, released March 18, 1996, *application for review pending*.

[5] TRT Telecommunications Corp., 46 FCC 2d 1042 (1974). There, the Commission refused to approve an agreement for direct service between TRT and its correspondent, the British Post Office, establishing a higher accounting rate than that agreed to by its U.S. competitors for direct telegraph and telex service to the U.K.

Commission review merely by so agreeing between themselves. Alternatively, and more likely, certain foreign carriers might, as has already happened in the past, take actions that advantage or disadvantage particular U.S. carriers.[6]

Sprint believes it will be even more important for the Commission to oversee settlement rates if there is an agreement in the pending World Trade Organization (WTO) telecommunications talks. As Sprint understands it, a WTO agreement would mean that the FCC could not deny a foreign carrier national treatment in seeking a license to enter the U.S. market. The foreign carrier could enter the U.S. market using its own facilities and correspond with itself for the provision of switched traffic notwithstanding its dominant status in its home market.

Even if the dominant foreign carrier utilized exactly the same accounting and settlement rates and charged the same collection rates as U.S. carriers providing service with that foreign carrier, the settlement rate would merely represent an internal transfer from one corporate pocket to the other. For

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[6] For example, until the International Bureau took corrective action, Entel, the monopoly carrier in Bolivia refused to accord Sprint the same accounting rate it had given AT&T. *See* AT&T Corp., DA 96-696, released May 7, 1996, *application for review pending*. In appealing the Bureau's action, Entel maintains (incorrectly, in Sprint's view) that the Communications Act does not give the Commission authority to compensate for Entel's competition-destroying behavior by ordering all U.S. carriers to pay at the most favorable rate negotiated by any U.S. carrier. *See* Entel Application for Review, June 6, 1996 at 12-15. If the Commission had no ability to correct this situation by ordering all U.S. carriers to settle their traffic at identical rates, carriers such as Entel would have a tremendous incentive to engage in such discrimination.

an unaffiliated U.S. carrier, however, the settlement outpayment represents a real cost.[7] U.S. carriers would have a difficult time competing for outbound traffic against such a foreign carrier under these conditions.

If a WTO agreement means that a foreign carrier could freely engage in inbound settlement bypass over private lines interconnected with the public switched network on the U.S. end, of course, the result could be even worse for the U.S. public interest, as the Commission recognizes in para. 11 of the *NPRM*. If similar resale opportunities do not exist on the foreign end, the foreign carrier will simply extract an unavoidable and substantial toll from U.S. ratepayers in the form of a high settlement rate for all U.S.-originating traffic. At the same time, the foreign carrier will be able to avoid that toll for all of its U.S.-terminating traffic by engaging in bypass over resold private lines or over its own facilities. In the latter event, U.S. carriers would be completely locked out of and could not compete for such U.S.-terminating traffic. The foreign carrier would thus be free to enrich itself and foreign ratepayers at the sole expense of U.S. ratepayers. Lack of Commission jurisdiction over a U.S. carrier's accounting and settlement rates would deprive the

[7] In its GTE Telecom decision, DA 96-1546, released September 16, 1996, *application for review pending*, the International Bureau recognized that self-correspondency between GTE Telecom and its foreign affiliates in the Dominican Republic and Venezuela raised similar issues. For this reason, it decided to defer a grant of authorization to GTE for these two routes.

Commission of the ability to redress this harm to U.S. ratepayers.

Of course, moving settlement rates closer towards costs would also reduce the financial incentives of foreign carriers to bypass settlement rates which exist even in the absence of a WTO agreement. The closer settlement rates are to their economic costs, the less the incentive to arbitrage between international switched services provided over resold private lines and similar (and substitutable) service provided under traditional correspondent relationships.

II. *The Commission Has the Authority to Establish Presumptive Benchmarks Based Upon Foreign Carriers' Tariff Component Pricing*

Sprint supports the Commission's proposal to utilize tariff component pricing (TCP) as the basis for the upper limits of its benchmarks. Sprint believes that there is a sound basis to use TCP as a presumptive upper limit for settlement benchmarks.

It is reasonable to derive the TCP's international facility component from the prices for foreign carrier digital private line half circuits. The Commission's assumptions of 4:1 multiplexing over such circuits is generally reasonable, and is consistent with Sprint's own experience. Additionally, the Commission's assumption of 8,000 minutes per line per month is also reasonable and even conservative when compared to the 9000 minute per month assumption embodied in the Commission's tandem switched transport rules. *See* 47. C.F.R. Sec. 69.111.

The rates by U.S. carriers for the U.S. private line half circuit to a particular country are also a useful tool to gauge the reasonableness of the foreign carrier's international facilities component. In most cases, these private circuits are on submarine cable systems, the entire cost and capacity of which are known to the Commission under its cable licensing processes. There is also an active and unregulated market for IRUs in submarine cable circuits. The foreign half of the wet portion of a submarine cable circuit is a mirror image of the U.S. half. U.S. half circuit prices, which are competitive, are therefore a useful means of evaluating whether the international facilities component is at cost based levels.

That said, Sprint also believes that the international gateway and national extension components are more problematic. The international gateway component prices are assertedly based on a TEUREM study[8] that is not in the record and which has not yet been subject to review and comment by interested parties. Sprint urges the Commission to place a copy of that study into the record so that interested parties can examine the study well before the deadline for reply

[8] NRPM at n. 49, n. 50.

comments. In that manner, the public can review the assumptions underlying the study's conclusions and calculations and the Commission can avoid the possible legal challenge to its benchmarks for failing to do so.[9]

Also somewhat problematic is the national extension component, which is essentially the price for telephone service within a particular country. As the Commission recognized in para. 45 of the *NPRM,* "many countries have rate structures that use high international or domestic long distance charges to offset below-cost local service fees." Some foreign carriers whose stock is traded in the U.S. have also stated as much.

In n. 52 of the *NPRM,* the Commission notes that some countries charge a flat rate for all national service and that a few countries do not charge telephone users at all for national service. In the latter cases, the per-minute price for the national extension component was established at zero in Appendix E to the *NPRM* even though the cost of this component is in all likelihood not zero.[10]

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[9] *See, e.g.,* FCC v. WNCN Listeners Guild, 610 F.2d 838, 846-7 (D.C. Cir. 1979) (criticizing Commission's failure to allow public to comment on a staff study on which Commission relied), *reversed* 450 U.S. 589 (1981) at n. 22 (characterizing Commission's failure to afford the public an opportunity to comment on a staff study before issuing a policy statement as a "procedural lapse.")

[10] Notwithstanding its statement in para. 40 of the NPRM that it saw no economic basis for requiring a U.S. carrier to pay a foreign carrier more than that carrier charges its domestic customers for the same service, presumably the Commission does not intend that a U.S. carrier which takes its traffic all the way to a foreign country over its own whole circuits should be entitled to terminate its traffic for free.

In short, it is not totally certain whether the international gateway and national extension components of the TCP accurately reflect a foreign carrier's costs, and there are limited means by which the Commission can ensure that the other parts of the TCP and its other assumptions more than compensate for any such shortcomings. For this reason, it is perhaps not entirely clear that "benchmarks based on tariffed component prices will fully compensate foreign carries for the costs they incur in terminating international traffic." *NPRM* at para. 42.

In other words, the Bureau's study and the Commission's proposed benchmarks make a strong case that existing settlement rates are too high by some large amount. The more difficult task is to fashion a regulatory scheme that builds on the valuable TCP data even if such data, taken alone, may be insufficiently reliable to use, without more support, as the basis for a Section 205 prescription.[11] Sprint suggests such a course of action below.

III. Establishment of the Lower End of the Benchmark Range

For the lower end of the benchmark range, the Commission proposes at para. 50 of the *NPRM* to use an estimate of the incremental cost of terminating international traffic

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[11] Sprint believes they are, however, sufficiently reliable for use under an interim payment arrangement under Section 4(i) of the Act. See Lincoln Telephone and Telegraph Co. v. FCC, *supra* at n. 3.

notwithstanding the acknowledged paucity of information to do so.[12] Because of this lack of data, the *NPRM* proposes to use AT&T's estimate of 7.5 cents per minute as its average per-minute network cost as a starting point to derive this number.[13] Recognizing the shortcomings of this methodology, however, the Commission also asks U.S. and foreign carriers to submit incremental cost data.

Sprint has no knowledge of foreign carriers' total or average costs for terminating an international call from the U.S., much less the foreign carrier's incremental costs for such termination. In many cases foreign carriers do not keep their accounts in any fashion that would permit them to calculate their average or incremental cost of service any more than the FCC would know how to calculate its average or incremental cost of regulating.

However, it is fair to assume that other foreign carriers, however, particularly those that have sophisticated financial reporting systems, probably have a good idea of their average costs of service and perhaps their incremental cost of service as well. At this point, there appears to be little incentive for foreign carriers to submit useful cost data in this proceeding, and the Commission cannot require

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[12] *See* NPRM at para. 33.

[13] AT&T arrived at this figure in a study it apparently submitted to the Commission in a December 16, 1997 letter to the Chief, International Bureau. NPRM at n. 57.

them to do so. Unless foreign carriers submit such information, Sprint believes it will be very difficult to establish lower benchmarks based solely upon AT&T's study. For this reason, Sprint urges the Commission to direct its efforts at this time towards establishment of the upper limits for its benchmarks.

Use of the AT&T study as a sole basis for establishing the lower limits for its benchmarks is problematic for another reason: like the TEUREM study on the international gateway component, the AT&T study has never been placed into the record so that the public may examine and comment on it. If the Commission is intent on using the AT&T study, Sprint urges the Commission at a minimum to place a copy into the record in this proceeding and to provide an opportunity to comment on it. In that manner, the public can review the assumptions underlying AT&T's calculations and conclusions, and the Commission can avoid potential legal challenge for failing to do so.[14]

III. Country-Specific Benchmarks vs. Ranges

Sprint believes the Commission should establish benchmarks by specific country where possible. The TCP method is based where possible on data gathered country-by-country; where such data is available, it would be inconsistent with

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[14] *See* FCC v. WNCN Listeners Guild, *supra* at n. 9.

this methodology and potentially unfair to individual countries to average them broadly. A particular country's geography or distance from the U.S., for example, would, all other things being equal, appear to be highly relevant to its TCP.

Such country-by-country benchmarks would thus reflect the unique conditions inherent in a particular country and permit the establishment of more accurate and precise benchmarks. Individual country benchmarks would also avoid difficult problems inherent in constructing averaged benchmarks, such as whether benchmarks should be weighted to reflect traffic volume, geography, or other variables. Where reliable TCP exists, country-specific benchmarks should be used. Such TCP should be readily available in most, if not all, upper income countries.

Sprint recognizes, however, that in some countries, it will be difficult or impossible to obtain reliable TCP data.[15] In such cases, the Commission has no alternative but to use proxies or averages to derive the TCP.

IV. Transition to Benchmarks

Sprint generally concurs with the Commission's proposals to phase in any benchmarks. The immediate imposition of benchmarks might well result in unintended harm to foreign

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[15] *See, e.g.*, fn. 9 of the Bureau's TCP Study, where the Bureau was forced to use proxies to derive international transmission facility rates for Haiti and Guyana because such prices are not disclosed.

administrations, particularly in low income countries. The exact phase-in period must, of necessity, be somewhat arbitrary and Sprint does not take issue with the suggested phase-in periods contained in the *NPRM.* However, the four or five year interval that would be allowed for some countries requires a "glidepath" or some form of annual review. Sprint believes that affording U.S. carriers four or five years to negotiate with low income countries is too long if no "glidepath" or similar approach is required by the Commission.

According to Appendix B of the *NPRM,* a number of the countries identified as low income in Appendix D to the *NPRM* are the recipients of significant settlement outpayments. It is likely that national carriers for some of these countries will use the long implementation period as a justification to keep settlement rates at existing levels. Subsequently, at the end of the four or five year grace period, they may argue to U.S. carriers and the Commission that they cannot realistically be expected to agree to the steep cuts in settlement rates that will be required to meet the benchmark levels. Because of their failure to transition settlement rates downward, they may well be right.

To make matters worse, the simultaneous expiration of the implementation period may create a need for simultaneous multiple enforcement efforts by the Commission. Sprint views these possible outcomes as undesirable, and believes it would these possible outcomes as undesirable, and believes it would be appropriate for the Commission to require that U.S. carriers lower settlement rates a proportionate amount every year.

V. Enforcement Mechanisms

No matter what method the Commission uses to arrive at its benchmarks, and whether or not the Commission uses benchmark ranges based on economic development or by specific country, any attempt to require U.S. carriers to settle at a particular benchmark rate on more than an interim basis is likely to be viewed as a prescription by a reviewing court.[16] In order to make a valid Section 205 prescription, the Commission must find that a particular rate is just and reasonable.[17] The Commission correctly notes in fn. 42 that rates need not be based purely on costs in order to be just and reasonable.[18] But it is also clear that the Commission's discretion in this area is not unlimited and that any

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[16] Nader v. FCC, 520 F.2d 182, 192 (D.C. Cir. 1975).

[17] AT&T v. FCC, 449 F.2d 439, 450 (2d Cir. 1971).

[18] For example, in the Permian Basin Area Rate Cases, discussed later herein, the Supreme Court approved the use of averaged rates based upon geographic areas rather than on the costs of any individual producer of gas. Sprint believes that the Commission's proposal to use averaged benchmarks as opposed to country by country benchmarks are similarly justifiable under the rationale of that case.

benchmarks the Commission might establish must lie within a zone of reasonableness.[19]

Sprint believes that, given the shortcomings of some of the data underlying the proposed benchmarks, it could in some cases be difficult to sustain a Commission decision prescribing the use of a particular benchmark rate or range of rates by a U.S. carrier.[20] For this reason, Sprint urges the Commission to use its benchmarks as presumptively reasonable settlement rates and to afford the public, including any foreign carriers who might be affected by such a prescription, an opportunity to rebut this presumption of reasonableness by responding to an Order to Show Cause. If interested parties are, after an opportunity to do so, unwilling or unable to rebut this presumption, the Commission may then prescribe a settlement rate for use by a U.S. carrier or require the use of that settlement rate on an interim basis pending further negotiations.

A regulatory approach similar to that suggested here was implemented in the 1960's by the former Federal Power Commission (FPC) and ultimately approved by the Supreme Court in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

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[19] *See, e.g.*, Nader v. FCC *supra* at 202 (there exists a "zone of reasonableness" within which the Commission's determination must be upheld.)

[20] By contrast, an interim billing arrangement such as that approved by the court in Lincoln Telephone, n. 3, *supra*, need not meet the exacting standards of a Section 205 prescription.

Faced with the insuperable administrative burden of calculating each natural gas producer's cost of service, the FPC decided to prescribe instead maximum rates for the sale of interstate gas within a particular producing area.

Like the Commission's method for deriving its proposed benchmarks in the instant proceeding, the FPC derived its maximum rate for new gas-well gas not from prevailing prices but "from composite cost data, obtained from published sources and from producers through a series of cost questionnaires," 390 U.S. at 761. The FPC also recognized that area maximum rates derived from composite cost data might in individual cases produce hardship and provided for relief in such cases. However, it also placed the burden upon the gas producer to establish the propriety of such an exception and stated that it would not stay enforcement of the area rates pending disposition of individual petitions for special relief. *Id.* at 764, 771.

The Court approved of these arrangements even though the FPC had provided for specific relief only in broad terms. It found that

> The Commission quite reasonably believed that the terms of any exceptional relief should be developed as its experience with area regulation lengthens. Moreover, area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequence; it is entirely possible that the Commission may later find that its area rate structure for the Permian Basin requires significant modification. We cannot now hold that, in these circumstances, the

> Commission's broad guarantees of special relief were inadequate or excessively imprecise.

390 U.S. at 772.

Importantly, the Court also specifically reversed the lower court's finding that the FPC was required to stay enforcement of the area rates pending disposition of petitions for special relief:

> We have no reason now to believe that it would in all cases prove an abuse of discretion for the Commission to deny a stay of the area rate order. There might be many situations in which a stay would be inappropriate; at a minimum, the Commission is entitled to give careful consideration to the substantiality of the claim for relief, and to the consequences of any delay in the full administration of the area rate structure. We therefore decline to bind the Commission to any inflexible obligation;

390 U.S. at 773.

Sprint believes that in the first instance, at least, the Commission should see whether private negotiations between U.S. and foreign carriers result in settlement rates that are within any benchmarks the Commission establishes. In the event such negotiations prove unsuccessful, however, Sprint believes that the Court's decision in *Permian Basin* provides a useful outline for crafting an enforcement mechanism that will withstand appellate review.

VI. Competitive Distortion in the IMTS Market

The Commission proposes at para. 76 to condition its authorizations to provide international services for carriers seeking to serve an affiliated foreign market from the U.S.

upon the foreign affiliate's offering U.S. international carriers a settlement rate within its proposed benchmarks. Sprint opposes this proposal as contrary to sound public policy and such action is, in any case, unnecessary.[21]

It is unnecessary because the Commission can under all circumstances rely on its benchmarks as a basis for exchanging traffic with any foreign carrier. Moreover, foreign carrier entry and investment should generally be encouraged for reasons Sprint has explained at length in other proceedings before the Commission. *See, e.g.*, Comments of Sprint on the Merger of MCI and BT, January 24, 1997 at 2-3. Suffice to say here that Commission authorizations should not be viewed as a prize to be awarded to or withheld from particular carriers in order to encourage certain behavior on the part of sovereign nations. Even the attempt to do so -- which will invariably be unsuccessful -- raises serious problems of comity.

Rather, the proper question to ask is whether the U.S. public interest is harmed by investment or entry by even dominant or monopoly foreign carriers. The answer to this question should turn on whether the degree of investment by the foreign carrier gives rise to an incentive to engage in anticompetitive discrimination against U.S. carriers and whether the Commission is able to adequately guard against the

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21 It may also violate any WTO agreement that is reached.

possibility of such discrimination through the imposition of safeguards.

In para. 77 of the *NPRM*, the Commission asks what mechanism or approach it should use to determine when there has been a distortion of competition in the IMTS market in order to prescribe use of a particular settlement rate. The Commission asks if a foreign carrier seeking to distort traffic flows in order to increase net settlement payments to its foreign affiliate, evading the requirements of the Commission's international settlements policy, or using substantially above-cost settlement rates on the foreign end to price its services in the U.S. market in an anticompetitive fashion would constitute distortion of competition.

Sprint believes that the Commission should approach this question with great care, for the Commission's rules are in many cases unclear, and one party's perception of competitive distortion is likely to be viewed as robust competition by another party. For example, one of the flaws of the Commission's rules on proportionate return and special concessions is that they are very broad. This very breadth raises many important questions. For example, as Sprint has pointed out earlier,[22] AT&T has, by virtue of its historical position, retained a *de facto* monopoly over operator-assisted

[22] *See, e.g.*, Supplemental Reply Comments of Sprint in CC Docket No. 90-337, March 14, 1996 at n. 15.

traffic originating from most foreign countries. The Commission has never held that such action by a foreign carrier constitutes a special concession.

Sprint is similarly unsure whether the Commission would, once a foreign carrier's affiliate enters the U.S. market, then regard a foreign carrier giving its affiliate all foreign operator originated traffic as a distortion of competition. From Sprint's point of view, at least, it suffers equal competitive harm whether the foreign carrier gives all of this operator traffic to AT&T or to its U.S. affiliate.

There are doubtless many other ways to accomplish the same goal of distorting competition. The problem of discrimination is too multifaceted and complex for the Commission to develop a single set of rules that will punish all "distortions" or provide a rigid code of conduct. Each case will have to be carefully reviewed based upon the specific facts involved to determine whether the behavior in question is sufficiently anticompetitive or prejudicial so as to warrant remedial action by the Commission. The Commission also needs to be creative in crafting appropriate remedies where a violation is discovered. As with the determination of the violation itself, much will depend on the particular circumstances involved.

CONCLUSION

With issuance of the *NPRM,* the Commission steps into largely uncharted territory. The *NPRM* raises questions as to the mechanisms by which it proposes to achieve its goals of settlement rates that are tied more closely to costs. There are many interests around the world that are quite satisfied with existing arrangements, and there are significant sums at stake. If history is a guide, requiring U.S. carriers to abide by particular settlement benchmarks is likely to be met with significant opposition from some quarters.

Although Sprint believes the Commission will ultimately prevail in its attempt to exert greater control over the settlement process, it may be some time before the Commission's authority to do so is firmly established. Sprint urges the Commission to stay the course, for its efforts are not only justified but also essential to bring substantial benefits to the American economy, and, more specifically, to the telecommunications consuming public.

Respectfully submitted,

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